NO. 80-1546

ALEXANDER L
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

PAUL A. ACQUISTO, Petitioner,

v.

LEE COUNTY BOARD OF PUBLIC INSTRUCTION

(The School Board of Lee County, Florida)

et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Petition for Certiorari sets forth any ground for review of the instant case on a conflict of decisions basis or any other basis suggested by this Court's Rule 17.1(a) (b) and (c).

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STATEMENT OF THE CASE

I. Course of Proceedings

The Petitioner's original complaint was filed in the United States District Court for the Middle District of Florida in August, 1977. The Petitioner sought restoration of back pay, seniority, actual and punitive damages and injunctive relief for alleged racial discrimination or illegal "preference" in employment.

The Respondents filed a motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted. The United States District Court granted the Respondents' motion (Appendix A). The United States Court of Appeals for the Fifth Circuit affirmed in a *per curiam* decision without opinion (Appendix B).

II. Statement of Facts

This suit was spawned as the result of a well publicized period of teachers' strikes throughout the State of Florida which occurred in February, 1968. More than four hundred Lee County school teachers participated in a statewide teacher "work stoppage" during this period. In response, the Respondent school board obtained a temporary restraining order in state court enjoining the teachers from striking. However, the state court recognized the right of all teachers to lawfully resign. The teachers thereupon submitted their mass resignations in writing and, after a proper waiting period, those resignations were accepted by the Respondent school board. After a period of negotiations through citizen mediators, both the teachers and the Respondent school board agreed to accept a proposal whereby all teachers that had resigned would be reemployed at their former positions, provided they each pay $100 to the Respondent. Thereafter, a suit was filed in the United States District Court for the Middle District of Florida, alleging that the $100 payments were "fines" and, as such, violated the Due Process Clause of the

Fourteenth Amendment of the United States Constitution. *National Education Association v. Lee County Board of Public Instruction*, 299 F. Supp. 834 (M.D.Fla., 1969). The suit culminated in an appeal before the United States Court of Appeals for the Fifth Circuit in *National Education Association v. Lee County Board of Public Instruction*, 467 F.2d 477 (5th Cir. 1972), wherein the court held that the Respondent school board could constitutionally require payment of $100 by each teacher who had resigned as a precondition to that teacher's reemployment with uninterrupted tenure and other employment privileges.

The Petitioner is a white Lee County school teacher who took part in the teacher work stoppage in February, 1968. The Petitioner was not reemployed by the Respondent school board in 1968 because the Petitioner refused to pay the $100 fine. In August, 1970, the Petitioner was reemployed by the Respondent school board, but as a beginning teacher without tenure or seniority.

The Petitioner alleged that he learned, on or about January 1, 1974, that, although five black teachers had paid the $100 fine with checks which were not honored (so that no actual payment was received), these teachers were not terminated by the Respondent school board and had retained their employment without loss of seniority. As a result, the Petitioner alleged that he was discriminated against because of the "preference" given the five black teachers.

In February, 1974, the Petitioner filed charges with the Equal Employment Opportunity Commission (EEOC). In June, 1977, the EEOC issued Petitioner a "right to sue" letter and this litigation ensued.

SUMMARY OF ARGUMENT

The Petitioner has failed to establish any basis sufficient for a grant of a writ of certiorari under the guidelines of this Court's Rule 17. There are no "special and important reasons" either set forth or apparent as to why the decision of the lower court should be reviewed.

The Petitioner does not demonstrate a conflict of decision among the courts on any issue of public importance. Neither is any substantive federal question raised.

The petition for certiorari should be denied.

ARGUMENT

The question presented by Petitioner does not allege any reason for review on writ of certiorari that is of the "special and important" character required by Rule 17. Rather, it is an attempt by Petitioner to reargue the merits of his case decided by the lower courts.

Rule 21.1(j) clearly requires that the petition address the question of this Court's discretionary jurisdiction and not discuss the merits of the case except as they essentially relate to the claim of jurisdiction.

The only ground for jurisdiction which can be gleaned from the petition is found on page 8 thereof as follows:

> "Certiorari Should Be Granted To Resolve Conflicts In Principle Among The Courts."

In order to avoid treating Petitioner's *pro se* action in a cavalier manner, Respondents will discuss all appropriate grounds for a writ of certiorari.

I

GENERAL DISCUSSION-GROUNDS FOR CERTIORARI

This Court has stated through Rule 17 and numerous decisions that certiorari is to be granted only in cases involving "special and important" issues which affect the public as a whole as opposed to only the parties to the litigation. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *N.L.R.B. v. Pittsburg Steamship Co.*, 340 U.S. 498 (1951); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387

In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), Mr. Justice Brandeis stated that " 'special and important reasons' imply a reach to problems beyond the academic or the episodic." *Id* at 341.

Petitioner has not alleged, nor is any adverse effect on the public as a whole apparent as a result of the holding of the

lower courts. Therefore, the issues involved in the instant case are necessarily episodic and not of sufficient public importance to qualify for certiorari review by this Court.

II

RULE 17.1(a)

Rule 17.1(a) provides essentially the following bases for review on writ of certiorari:

1) A federal court of appeals has rendered a decision in conflict with another federal court of appeals;

2) A federal court of appeals has decided a federal question in a way which conflicts with a state court of last resort;

3) A federal court of appeals has either sanctioned a lower court's departure from traditional court proceedings or has itself so far departed from usual proceedings as to require this Court's supervisory power.

1) Conflict Between Circuits

The Fifth Circuit Court of Appeals rendered a *per curiam* decision without opinion in favor of the Respondents. It is not possible for this decision to be in conflict with holdings of other federal courts of appeal so as to qualify for conflict certiorari. It is clear from past decisions of this Court that before a conflict exists between the circuits, there must be written decisions which are in conflict. See, *e.g., Chaffin v. Stynchcombe*, 412 U.S. 17,21 (1973); *Hellenic Lines Limited v. Roditis*, 398 U.S. 306, 307 (1970); *U.S. v. Webb, Inc.*, 396 U.S. 179, 182 (1970); *Bruning v. U.S.*, 376 U.S. 358, 359 (1964); *U.S. v. Muniz*, 374 U.S. 150, 151 (1963).

In any event, the Court of Appeals' decision merely affirmed the District Court's decision that Petitioner had failed to state a claim upon which relief could be granted. After three amended complaints, Petitioner's substantive claims appeared to be based on 42 U.S.C. §1981, 1983, 1985, and 1986, and an allegation that the Respondent had perpetrated a fraud upon the Court of Appeals in prior litigation, (*N.E.A. v. Lee County Board of Public Instruction*, 467 F.2d 447 (1972)). Petitioner's causes of action under Title 42 were held to be barred under the appropriate statutes of limitations.

Petitioner does not now allege, nor are Respondents able to ascertain any court of appeals' decision in conflict with the holding of the district court in the instant case. Even if such a conflict should exist, it would not be of such a nature as to qualify for the grant of a writ of certiorari. This Court stated in *Layne & Bowler Corp.*, the following concerning conflict certiorari:

> "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.*, at 393.

The only apparent conflict of decisions between the courts of appeal in the instant case is the application of the appropriate state statute of limitations for actions under 42 U.S.C. §§1981, 1983 and 1985. This is necessarily so since there is no controlling federal statute of limitations, and the federal courts must apply the most appropriate one under state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Since each state has its own statute of limitations, the federal courts may apply different time periods depending upon the appropriate statute in the state in which they sit.

However, conflict arising from the federal court's application of local law cannot be the basis for conflict certiorari. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). In *Ruhlin*, this Court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Id* at 206.

Clearly, no "real and embarrassing conflict of opinion and authority" exists as to any issue present in the instant case.

2) Conflict Between a Federal Court of Appeals and a State Court of Last Resort Regarding a Federal Question

The provision of Rule 17.1(a) regarding conflicts between federal courts of appeal and state courts of last resort concerning a federal question is clearly inapplicable to this case. No issue has been raised nor could one be raised concerning such a conflict.

3) Supervisory Power of the Court

The Petitioner has asserted that the Respondent committed a fraud upon the Court of Appeals in prior litigation (*N.E.A. v. Lee County Board of Public Instruction, supra*). The Petitioner does not disclose the reasons for which a writ of certiorari should be granted to review the decision of the lower courts on this issue. The Respondents can only suppose that the Petitioner believes the lower court's actions in passing upon the issue of fraud were so far out of the course of usual judicial proceedings as to require this Court to exercise its supervisory power.

The Petitioner's claim of fraud is a spurious allegation at best. It is well settled that non-disclosure of information does not constitute fraud upon the court where such information is not material or relevant to the issues presented. *Wilkin v. Sunbeam Corp.*, 466 F.2d 174 (10th Cir., 1972), *cert. denied*, 409 U.S. 1126 (1973); *England v. Doyle*, 281 F.2d 304 (9th Cir. 1960). Petitioner vigorously urged his claim of fraud upon the Court of Appeals at oral argument. It would be expected that the Court of Appeals would be most vigilant in protecting itself from fraud and must have been thoroughly satisfied that no fraud was committed in light of its ultimate decision.

There is no showing by the Petitioner of any departure from the usual course of judicial proceedings in the disposition of the instant case in the lower courts.

III

RULE 17.1(b)

Clearly Rule 17.1(b) does not apply to this case as the court of origin was a federal district court.

IV

RULE 17.1(c)

Rule 17.1(c) is also not applicable to the present case as no "important question of federal law" was decided by the lower courts which has not previously been decided by this court or was decided in a way which was contrary to prior decisions of this Court.

V

CONCLUSION

The petition does not set forth any "special and important reasons" sufficient for granting a writ of certiorari. Additionally, no sufficient ground is apparent. Therefore, the Respondents respectfully request that the petition be denied.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

PAUL A. ACQUISTO, :

Plaintiff, :

vs. : Case No. 77-48 Civ. Ft.M-K

LEE COUNTY BOARD OF PUBLIC INSTRUCTION (SCHOOL BOARD OF LEE COUNTY), et. al, :

Defendants. :

ORDER

The Court has before it plaintiff's motions for summary judgment and for appointment of counsel and defendants' motion to dismiss.

PLAINTIFF'S CLAIMS

Plaintiff is seeking restoration of back pay, benefits, and seniority, actual and punitive damages and injunctive relief. Plaintiff is a white person who was employed as a teacher by defendant Board of Public Instruction in February 1968. At that time, he and many other teachers took part in a work stoppage. The teachers were enjoined from striking. They then voluntarily submitted simultaneous mass resignations. The United States Court of Appeals for the Fifth Circuit held, in

National Education Association v. Lee County Board of Public Instruction, 467 F.2d 447 (1972), that the Board could constitutionally require payment of $100 by each teacher who had resigned as a precondition to that teacher's re-employment with uninterrupted tenure and other privileges.

Plaintiff refused to pay the $100. Plaintiff alleges that the Board did not rehire plaintiff until on or about August 24, 1970. He alleges that he learned, on or about January 1, 1974, that, although five black teachers had paid the $100 payments with checks which were not honored (so that no actual payment was received), these teachers were retained or reinstated without loss of seniority.

Plaintiff alleges jurisdiction in this Court under "the provisions of the Civil Rights Acts, and 42 USCA sections 1981, 1983, 1985, 1986; 18 USCA sections 241, 242, 245, 1001; 28 USCA sections 1331, 1343, 1355; and the Fifth and Fourteenth Amendments to the United States Constitution."

PLAINTIFF'S MOTIONS

Defendants' affidavit in opposition to the motion for summary judgment indicates the existence of genuine issues of material fact. The existence of other such issues is indicated by defendant's motion to dismiss and memorandum in support. Plaintiff's motion for summary judgment is DENIED. Rule 56 (c), Fed.R.Civ.P.

Plaintiff's motion for appointment of counsel is DENIED. Although 28 U.S.C. §1915 grants general authority for the appointment of counsel, as a matter of discretion, in purely private, civil litigation, there is no express provision for the payment of fees or reimbursement of costs, as there is in the case of criminal prosecutions and habeas corpus proceedings. *Moss v. Thomas*, 299 F.2d 729 (6th Cir. 1962). The number of lawyers willing to accept appointment on a pro bono publico basis is limited. As a consequence, the Court is unable to honor all the requests made for the appointment of counsel.

MOTION TO DISMISS

18 U.S.C. §§241, 242, 245, and 1001 are criminal statutes, none of which will support a civil suit by a private party. *See* §241 at note 57, §242 at note 37, and cases cited therunder.

28 U.S.C. §§1331, 1343, and 1355 are jurisdictional statutes, which give the district courts jurisdiction of causes of action authorized elsewhere. None of these sections sets out a cause of action by itself.

Ground I of defendants' motion to dismiss contends that they were exempt from the requirements of Title VII of the Civil Rights Act of 1964, at the time of the alleged discrimination. State and local government employees were not brought under the coverage of Title VII until the 1972 amendments. Pub.L. 92-261, 1972 U.S.Code Cong. and Adm.News, pp. 2152-54. The 1972 amendments do not apply retroactively; state and local government employees are covered only as of March 24, 1972, the effective date of the amendments. *Jones v. City of San Antonio*, 568 F.2d 1224 (5th Cir. 1978). Plaintiff has failed to state a cause of action under the Civil Rights Acts. (Plaintiff's reply to the motion to dismiss does not contest the arguments made in Ground I of the motion to dismiss.)

Ground III of the motion to dismiss contends that plaintiff's claims under 42 U.S.C. §§1981, 1983, 1985, and 1986 are all barred by the applicable statutes of limitations. §1986 contains a one year period of limitation. Where there are no specifically stated or otherwise relevant federal statutes of limitation, the controlling periods are the most appropriate ones provided by state law. *Johnson v. Railway Express Agency, Inc.*, 95 S.Ct. 1716, 1721 (1975) (§1981); *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976) (§1983 & 1985).

Defendants argue that the proper period is provided by Fla. Stat. §9511 (7) (b):

> ...Actions other than those for the recovery of real property can only be commenced as follows:
>
> (7) WITHIN ONE YEAR.—
>
> (b) Suits for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime.

As of January 1, 1975, this statute was replaced by Fla. Stat. §95.11 (4) (c), which provides a two year statute of limitation. The change is not material to the Court's ruling on this motion.

Plaintiff contends that the proper period is provided by Fla. Stat. §95.11 (1) (1967):

> ...Actions other than those for the recovery of real property can only be commenced as follows:
>
> (1) WITHIN TWENTY YEARS.— An action upon a judgment or decree of a court of record in the state, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.

Plaintiff contends that state law requires that teachers be hired by contract given under seal, so that §95.11 (1) applies. What he overlooks is that this suit is not an action upon contract, but rather an action for discrimination in employment. No breach of contract is alleged. In such cases, §95.11 (7) (b) (or its successor) applies. *Cutliff v. Greyhound Lines, Inc.*, 558 F.2d 803 (5th Cir. 1977); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974).

The Supreme Court of the United States has held, in *Johnson v. Railway Express, supra* at 1723, that the filing of an EEOC complaint does not toll the statute of limitations for a §1981 action relating to the same allegations. Based upon the reasoning in that opinion, this Court must hold that the filing of an EEOC complaint does not toll statutes of limitation for purposes of §1981, §1985, or §1986.

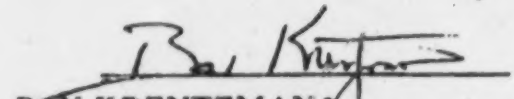
Although the effects of the alleged discrimination may persist, it is not a "continuing violation." The violation, if it occurred, accrued on or before the date plaintiff learned the black teachers were retained despite their failure to make the $100 payments. *Cutliffe, supra* at n.5.

Plaintiff's claims accrued no later than early January, 1974. No event tolled the running of the statutes of limitation. This suit was filed August 26, 1977. The periods of limitation having run before suit was filed, plaintiff's claims under 42 U.S.C §§1981, 1983, §1985, and §1986 are barred by the passage of time. Relief may not be granted upon any of them.

Although plaintiff mentions the Fifth and Fourteenth Amendments to the United States Constitution, none of his pleadings suggest any cause of action arising under them, other than those dealt with above.

Plaintiff having failed to state a claim upon which relief can be granted, defendants' motion to dismiss should be and it is GRANTED.

IT IS SO ORDERED at Tampa, Florida this 23rd day of July, 1979.



BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-3683

PAUL A. ACQUISTO,

Plaintiff-Appellant,

versus

LEE COUNTY BOARD OF PUBLIC INSTRUCTION (SCHOOL BOARD OF LEE COUNTY), ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(DECEMBER 3, 1980)

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21. 1/

1/ *See NLRB v. Amalgamated Clothing Workers of America,* 430 F.2d 966 (5th Cir. 1970).